JD–81–00
Philadelphia, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TRANSMONTAIGNE, INC.

and Case 4–CA–27610

TEAMSTERS LOCAL UNION NO. 929 a/w
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL–CIO

William E. Slack, Jr., Esq., for the General Counsel.
William H. Haller, Esq., of Philadelphia, PA, for the Charging Party.
Thomas A. Siratovich, Esq., of Denver, CO, for the Respondent

DECISION

Statement of the Case

RICHARD A. SCULLY, Administrative Law Judge. Upon charges filed on October 29, 1998 by Teamsters Local Union No. 929, affiliated with International Brotherhood of Teamsters, AFL-CIO (the Union), the Regional Director, Region 4, National Labor Relations Board (the Board), issued a complaint on June 7, 1999, and an amended complaint on March 7, 2000, alleging that TransMontaigne, Inc. (the Respondent) had committed violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing to recognize and bargain with the Union as the exclusive collective bargaining representative of employees in an appropriate bargaining unit since October 30, 1998. The Respondent has filed timely answers denying that it has committed any violation of the Act.

All parties have agreed to waive their rights to an evidentiary hearing before an administrative law judge and to submit a Stipulation of Facts with attached Exhibits which will constitute the entire record in this case. Briefs submitted on behalf of all parties have been given due consideration. Upon this record, I make the following

Findings of Fact

The parties have stipulated as follows:

Prior to October 30, 1998, the Louis Dreyfus Energy Corp. (LDEC), a wholly-owned subsidiary of Louis Dreyfus Corporation (LDC), owned and operated a refined petroleum products (heating oil, low sulfur diesel fuel, and kerosene) storage and terminaling facility located at 58th Street and the Schuylkill River in Philadelphia, PA (the Philadelphia Terminal). LDEC recognized the Union as the exclusive collective bargaining representative of a unit consisting of:

All employees classified as terminal operators who are employed by the Respondent at its Philadelphia Terminal, 58th Street, Philadelphia, Pennsylvania, but excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act (the Unit).

Joint Exhibit No. 1 is an agreement titled "Labor Agreement Plus Amendment Philadelphia PA," having an effective date of December 1, 1995 to November 30, 1998 (the Labor Agreement), which constituted the collective bargaining agreement between LDEC and the Union with respect to the Unit.

As of October 29, 1998, LDEC employed two employees in the Unit at the Philadelphia Terminal, terminal operators William Aaron and James Dowdell. Aaron and Dowdell reported to Terminal Manager John Small.

Effective October 30, 1998, the Respondent, through its wholly-owned subsidiary, TransMontaigne Product Services, Inc. (TPSI), acquired all of the issued and outstanding capital stock of LDEC from its owner LDC, an unaffiliated third party, with LDEC, which was renamed TransMontaigne Product Services East, Inc. (TPSE), becoming a wholly-owned subsidiary of TPSI. Effective April 1, 1999, TPSE was merged into TPSI, at which time TPSE, formerly LDEC, was liquidated and ceased to exist.

During the past year, the Respondent, through the activities of its wholly-owned subsidiary, TPSI, has sold and shipped goods valued in excess of $50,000 from the Philadelphia Terminal directly to points located outside the Commonwealth of Pennsylvania.

Following the Respondent's acquisition of LDEC (renamed TPSE), Aaron and Dowdell continued to be employed at the Philadelphia Terminal as employees of TPSE and then on April 1, 1999, subsequent to the merger of TSPE into TPSI and the liquidation of TSPE (formerly LDEC), as employees of TPSI and continued to be classified as terminal operators. In conjunction with the acquisition of LDEC by the Respondent, and as employees of TSPE and subsequently TPSI, Aaron and Dowdell became and remain full participants in the Respondent's welfare and benefit plans, including group health, retirement savings plan, life insurance benefits, vacation eligibility and holiday benefits. There has been no substantial change in the duties performed by Aaron and Dowdell since the Respondent's acquisition of LDEC, and Aaron and Dowdell have continued to report to the terminal manager. Aaron, Dowdell and the terminal manager have been the only individuals employed at the Philadelphia Terminal since the Respondent's acquisition of LDEC.

Since the Respondent's acquisition of LDEC, the Philadelphia Terminal has continued to operate as a refined petroleum products storage and terminaling facility. There has been no substantial change in the manner in which the Philadelphia Terminal operates since the acquisition of LDEC by the Respondent, and the Respondent, through its wholly-owned subsidiary, TPSI, has continued business operations at the Philadelphia Terminal without interruption or substantial change.

Article 2 of the Labor Agreement provides that "[I]n the event of a bona fide sale of the assets or change in ownership, or in the event COMPANY ceases operation of the facility, any successor COMPANY which purchases, acquires or becomes the EMPLOYER of EMPLOYEES presently covered by the Recognition clause shall not be bound by this Recognition clause." (Emphasis supplied)

At all times material, Erik Carlson has held the position of the Respondent's Senior Vice

President and has been an agent of the Respondent and its subsidiary enterprises, including TPSI, and during the time of its existence which ceased on April 1, 1999, TPSE, within the meaning of Section 2(13) of the Act. At all times material, Paul Cardullo has been the Union's president. In October and November 1998, Carter Williamson was employed by the Union as its counsel.

Erik Carlson sent the Union a letter, dated October 28, 1998, which stated in part:

> This is to advise you that TransMontaigne Inc. ("TransMontaigne") has entered into a formal definitive agreement with Louis Dreyfus Corporation, pursuant to which TransMontaigne will acquire all of the issued and outstanding stock of Louis Dreyfus Energy Corp. Closing of this transaction is anticipated to occur on October 30, 1998. As provided in Article 2 of the Labor Agreement between Louis Dreyfus Energy Corp. and Teamsters Local Union No. 929 dated November 30, 1995, TransMontaigne is not obligated and does not intend to recognize the Union.

The letter also stated that TransMontaigne would be contacting employees of the Philadelphia Terminal to offer them employment with it upon terms and conditions established by TransMontaigne management.

By letters dated October 29 and November 13, 1998, respectively, to Erik Carlson, Carter Williamson requested that the Respondent recognize the Union and negotiate with it a new collective bargaining agreement covering the employees in the Unit.

There have been no further communications between the Respondent, TPSI and/or TPSE and the Union concerning the Union's representation of the Unit at the Philadelphia Terminal.

Analysis and Conclusions

The sole issue is whether the Respondent was obligated to recognize and bargain with the Union once it acquired and began to operate the Philadelphia Terminal.

The Respondent contends that it has no such obligation because the Union waived its rights to represent the employees in the Unit by virtue of the recognition clause in Article 2 of the Labor Agreement between the Union and LDEC. Article 2 provides, in part: "In the event of a bona fide sale of the assets or change in ownership, or in the event COMPANY ceases operation of the facility, any successor COMPANY which purchases, acquires or becomes the EMPLOYER of EMPLOYEES presently covered by the Recognition clause shall not be bound by this Recognition clause." The Respondent asserts that when it purchased the stock of LDEC, it became a successor employer to LDEC, but the successor's duty to bargain with the incumbent union had been knowingly and voluntarily waived by the clear and unambiguous language of Article 2.

Even assuming that the waiver language relied on by the Respondent meets the "clear and unmistakable" standard set by the Supreme Court in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), insofar as it applies to a "successor" to LDEC, that language is not applicable under the circumstances involved here. The Respondent's argument that it does apply fails to recognize the distinction between a "successorship" and a "stock transfer." As the Board stated in *Hendricks-Miller Typographic Co.*, 240 NLRB 1082 (1979):

> The concept of "successorship" as considered by the United States Supreme

> Court in *N.L.R.B. v. Burns International Security Services, Inc., et al.*, 406 U.S. 272 (1972), and its progeny, contemplates the substitution of one employer for another, where the predecessor employer either terminates its existence or otherwise ceases to have any relationship to the ongoing operations of the successor employer. Once it has been found that this "break" between predecessor and successor has occurred, the Board and the courts then look to other factors to see how wide or narrow this disjunction is, and thus determine to what extent the obligations of the predecessor devolve upon its successor.
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> . . .
>
> The stock transfer differs significantly, in its genesis, from the successorship, for the stock transfer involves no break or hiatus between two legal entities, but is, rather the continuing existence of a legal entity, albeit under new ownership. 240 NLRB at 1083, fn. 4.

It is fundamental that a corporation and its stockholders are separate and distinct entities and that a mere change in the latter does not absolve the former of its continuing responsibilities under the Act. If it did, it "would mean that everyday's transactions on every major stock exchange and every purchase or sale of a corporate subsidiary would carry with it the potential for total disruption of the labor relations of the business being bought or sold." *EPE, Inc.*, 284 NLRB 191, 198 (1987).

In the present case, there was no predecessor or successor, there was simply a transfer of stock which did not involve a substitution of one employer for another. After the transfer occurred, the employees in the Unit continued to work for the same employer, LDEC renamed "TPSE," at the same facility, performing the same duties, under the same supervision. The only thing that had changed was the ownership of the stock of LDEC. The changes in stock ownership and corporate name did not result in any significant changes to the operation of the Philadelphia Terminal, its management, the composition of the Unit, or the stability of the existing bargaining relationship and there was no break or hiatus between two legal entities. Consequently, TSPE was not a successor to LDEC, it was the same legal entity. See e.g., *M.C.P. Foods*, 311 NLRB 1159, 1160 (1993); *Rockwood Energy & Mineral Corp.*, 299 NLRB 1136,1139 (1990), enfd. 942 F.2d 169 (3d Cir. 1993); *EPE, Inc.*, above at 198–199; *Western Boot & Shoe*, 205 NLRB 999, 1004–1005 (1973).[1]

Because there was no "successor" owner of the Philadelphia Terminal or "successor" employer of the employees in the Unit, the alleged waiver contained in Article 2 of the contract is inapplicable and the Respondent, into which LDEC/TSPE was merged, remained obligated to recognize and bargain with the Union. It is clear from the actions of the Union, in requesting that the Respondent recognize and bargain with it following the stock transfer, that it had not disclaimed interest in representing the Unit. I find that the Respondent's failure and refusal to do so violated Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. The Respondent, TransMontaigne, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Although these and similar cases did not involve a waiver issue, the underlying principle applies here.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees classified as terminal operators who are employed by the Respondent at its Philadelphia Terminal, 58th Street, Philadelphia, Pennsylvania, but excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been the exclusive representative of all employees in the above-described unit for the purposes of collective bargaining with respect to rates of pay, hours of employment, and other terms and conditions of employment within the meaning of Section 9(a) of the Act.

5. The Respondent has violated Section 8(a)(5) and (1) of the Act by, since October 30, 1998, failing and refusing to recognize and bargain with the Union as the exclusive collective bargaining representative of employees in the Unit.

6. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it should be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has violated section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to recognize and bargain with the Union as the exclusive collective bargaining representative of the employees in the Unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER[2]

The Respondent, TransMontaigne, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union as the exclusive collective bargaining representative of employees in the Unit.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All employees classified as terminal operators who are employed by the Respondent at its Philadelphia terminal, 58th Street, Philadelphia, Pennsylvania, but excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Philadelphia, Pennsylvania, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 30, 1998.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 23, 2000

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Richard A. Scully
Administrative Law Judge

[3] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to recognize and bargain with Teamsters Local Union No. 929, affiliated with International Brotherhood of Teamsters, AFL-CIO as the exclusive collective bargaining representative of our employees in the appropriate bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and upon request bargain with the Union as the exclusive representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All employees classified as terminal operators who are employed by the Respondent at its Philadelphia terminal, 58th Street, Philadelphia, Pennsylvania, but excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

TRANSMONTAIGNE, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 615 Chestnut Street, 7th Floor, Philadelphia, PA, 19106–4404, Telephone 215–597–7643.